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AIDE MEMOIRE

Proposed Legislation - Intelligence Sources and Methods

1. Status:

(a) On 12 January 1974, I sent to OMB, with copies to the community, draft legislation prescribing a criminal penalty for the unauthorized disclosure of intelligence sources and methods by those having a privity of relationship to such information. During most of 1974 the proposal was tied up in negotiations with the Department of Justice, but Chairman Nedzi held hearings on the topic with CIA and Justice witnesses.

(b) Following a considerable narrowing of points of difference between the CIA and Justice, a new draft proposal was sent to OMB on 23 April 1975, with copies to the community.

(c) The 23 April 1975 draft proposal has been circulated by OMB for Executive branch coordination. I urge the strongest support of your agencies and departments to facilitate its early clearance by OMB and transmittal to the Congress. If there are any differences among us, I am sure they can be ironed out as we did just a week ago with our good friends in INR.

2. Need: There are a number of factors bearing on the need for submitting such proposed legislation and wisdom of doing so now. It is true that we recently received a favorable decision in the Marchetti case,

but all of us recognize that injunctions based upon secrecy agreements, while helpful, will not meet the needs we face today.

(a) Concerns:

(1) Agee case;

(2) Foreign liaison;

(3) Methods [redacted] national means of verification); STAT

(4) Impact on employee morale and continued forbearance and discipline.

(b) Atmospherics:

(1) Courts--Marchetti decision lays First Amendment bogeyman to rest.

(2) Public Opinion--Extraordinary enthusiastic congressional reaction to the President's statement on intelligence in his State of the World Address of 1 April.

[redacted] STAT

(4) Congress--In day-to-day dealings with the Congress, with one or two exceptions, we get indications of strong support for the need to protect intelligence sources and methods.

3. Responsibilities:

(a) The 1947 Act expresses national policy that intelligence

sources and methods be protected as national assets. That protection is woefully incomplete under current law. I have no recourse other than to recommend legislation to close the gap.

(b) The Select Committees investigating intelligence may recommend a redefinition of the foreign intelligence charter, but in the process, no doubt, will also recognize the absolute need to guarantee confidentiality in intelligence arrangements.

(c) It would be very helpful to have before these committees and other congressional committees a firm legislative proposal soonest as it will require seasoning, hearings, and possible adjustment in language. The sooner we get the proposal to the Hill, the sooner we can embark on the educational process involved.

(d) There are a number of statutory precedents for such legislation, and I firmly believe that the nation will agree that our confidential sources of national foreign intelligence information are as important to protect as a citizen's income tax return, cotton statistics, etc.

4. Timing:

(a) Some have argued that now is not a propitious time to transmit this legislation to Congress, and that it might prejudice

that section in the revision of the criminal code making it a crime to disclose classified information (S. 1, section 1124).

(b) The similarities between the two proposals begin and end with their application to the same class of persons. However, the criminal code revision is broader (it applies to "classified information") than intelligence sources and methods information. We have already made significant headway in recognizing intelligence sources and methods as "born classified" thus falling in a category similar to that of Communications Intelligence and Restricted Data. Our proposal also provides an injunction provision patterned after the Restricted Data statute, and a court review to assure the reasonableness of information designated as "intelligence sources and methods" and subject to the statute.

(c) From the readings we have taken on the Hill, the criminal code revision provision is in trouble, principally because of its breadth in applying to all classified information, including that authorized pursuant to Executive Order.

(d) As far as timing is concerned there would be no better time for this legislation to be transmitted to the Hill than now while the select and other committees are considering inadequacies in existing legislation.

5. Gaps in Existing Law: See attached.

LEGAL PROTECTION OF INTELLIGENCE INFORMATION

1. Current criminal law protecting national security or national defense information is for practical purposes limited to two general and three restricted statutes. The basic espionage statutes are 18 U.S.C. 793 and 794, which punish the collection of national defense information and its transmission to foreign powers by any person, as well as the willful communication or negligent loss of such information by a person having lawful possession of it, and the retention of such information by a person having unlawful possession of it. These statutes derive from the first important statute dealing with the broad problem of espionage which was passed in 1911. Sections 793 and 794 have not been modified substantially since their enactment in the Espionage Act of 1917. The more restricted statutes are 18 U.S.C. 798, which protects classified communications information; 42 U.S.C. 2274 and 2275, which is confined to Restricted Data and 50 U.S.C. 783(b), which covers the passing of classified information by an officer or employee of the United States to anyone he has reason to believe to be a representative of a foreign power.

2. None of these criminal statutes either individually or in combination offers adequate or effective protection for intelligence information or intelligence sources and methods. The statutory responsibility of the Director of Central Intelligence for protecting intelligence sources and methods from unauthorized disclosure is set forth in the National Security Act of 1947, but without criminal sanctions which could aid in enforcing this responsibility. The Congress has recognized and implemented the Director's responsibility only by enactment of a number of special authorities for the Agency and a number of exemptions from certain legal requirements otherwise having general application throughout the government. Thus the Agency is exempted from the provisions of any law requiring the publication or disclosure of organization functions, names, official titles, salaries or numbers of personnel employed by the Agency; authorized to expend funds made available to it solely on the certificate of the Director; and authorized to terminate employees without regard to the provisions of other laws governing federal personnel actions.

3. Because 18 U.S.C. 798 is confined to classified communications information and 42 U.S.C. 2274 and 2275 to Restricted Data, the only substantial criminal sanctions we can

look to in protecting intelligence sources and methods are the basic espionage statutes, 18 U.S.C. 793 and 794, and 50 U.S.C. 783(b), which provides sanctions only against the officer or employee passing information to a foreign agent. These statutes were not designed to cover the peculiar problems presented by intelligence sources and methods and consequently give inadequate protection.

4. The basic difficulties with 793 and 794 are the requirement to establish intent or reason to believe that the information passed will be used to harm the United States or aid a foreign nation, and the requirement to convince the jury that the information involved relates to the national defense. The latter requirement, of course, would result in confirming sensitive information which needs to be protected, and thus may often preclude a prosecution. This is a fact now well recognized in the legal community and even in cases not directly involving the Agency often results in attempts by defense counsel to subpoena Agency personnel or information with the knowledge that the Agency may refuse to produce and thus prejudice or cause dismissal of the government's case.

5. The most effective statute from the point of view of permitting prosecution without exposing the information which needs protection is 50 U.S.C. 783(b). This was enacted as a part of the Internal Security Act of 1950, is confined to offenses by federal employees and requires proof only that the employee knew or had

reason to believe that the person to whom he communicated classified information was an agent or representative of a foreign government or officer or member of a communist organization. This statute was upheld in the conviction of Irvin Scarbeck, a foreign service officer, who passed classified information to a Polish official. The court held that the prosecution must establish only that the material was marked classified, and that the court need not consider whether or not it was properly classified. The limitations on the effectiveness of this statute are that the offender must be a federal employee at the time of the offense and that the recipient of the information must be an agent of a foreign power.

6. Contract Theory

In the Marchetti case the Government was successful in obtaining a civil injunction based upon a contract, i.e, a secrecy agreement executed as a condition of employment in the interest of protecting sensitive intelligence sources and methods. The secrecy agreement requires prior Agency approval for the publication of classified information learned during employment. The initiation of a civil injunction depends upon prior knowledge of an intended disclosure. Not only would this be beyond the capability of this Agency, but Agency efforts to obtain such prior knowledge may themselves be subject to criticism.